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POLICY IN

HAWAII:

LAND EXCHANGES

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LAND EXCHANGES

public land policy. These suspicions have persisted, thereby coloring the discussion of public land policy over the years. They have led Hawaii's Territorial and State Legislatures to limit the scope of exchanges severely. These limits may have been too harsh, and it is possible that they should be modified. It is, therefore, all the more essential to closely examine the most questionable applications of exchange policy. Consideration of these excesses may assist contemporary policy-makers by "clearing the air," thus helping them and others in the community to comprehend the background of the long-standing distrust of exchanges. In the light of such an examination it may be possible objectively to determine whether such fears remain justified.

The History of the Lanai Exchange

The most notorious exchange which took place during the early Territorial period, and which contributed most to the widespread distrust of exchange policy, was one which--at a single stroke--disposed of some 48,000 acres of government land on the Island of Lanai in 1907. Its background can be traced to the bankruptcy of the Manalei Sugar Company which had failed in its attempt to raise sugar cane on Lanai. Its lands were put up for bid at a foreclosure sale. The successful bidder was Charles Gay, who envisioned the development of a ranch encompassing the entire island. An investment of roughly \$160,000 secured for Gay all the fee-simple lands of the island as well as a leasehold interest in the rich government lands on which were located the only major sources of fresh water. Having secured control of about half of Lanai, Gay made limited investments in improvements and initiated large-scale ranching operations. But he did not prosper. Hardly had he launched his enterprise, when Lanai was afflicted by one of its periodic droughts.⁵ Gay's sheep died by the thousands, and he found it difficult to borrow additional capital under the circumstances. Confronted by these problems, Gay approached the Governor of the Territory, Sanford Dole, and, as recounted in his own words:

I asked him if there was not some way that could be gone about for my getting the Government lands [of Lanai]. I showed him on the map how the Government lands and the private lands were dividing each other . . . and that it was very hard for me to do anything. With the leases running out, I did not feel it was a safe investment to put a lot of money into Government lands laying pipes, etc., when I was not sure of getting them again; somebody might step in and take my improvements. After speaking to Governor Dole several times, he agreed to come up and see Lanai, and . . . I took him over the lands and showed him all the lands and how they were sub-divided, and he agreed--he said before he would

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give any decision he thought there ought to be a survey of the island made. . . . Before the survey was completed, Governor Dole resigned, and Governor Carter became Governor . . . and I went to see him about it . . . and he promised to come up and see.⁶

Gay's persistent efforts finally brought results. He was informed by the Commissioner of Public Lands that the Territory had been considering the possibility of acquiring the Bishop Wharves. Although these wharves were owned by the Bishop Estate, the possibility of an exchange patterned after the McCandless Esplanade transaction was suggested. This would have required Gay to purchase from the Bishop Estate the wharf property, which he would then have offered to the government in exchange for the Lanai lands. This line of negotiations was pursued, but it was abandoned after Gay "made inquiries" and learned from the Bishop Estate that "the lowest figure they would take would be about \$135,000, which I thought was too large for the Lanai lands. I dropped it"⁷--but not for long. Seeking to develop an alternative proposition, Gay again approached the Commissioner of Public Lands, James W. Pratt, through his attorney, H. E. Cooper. Cooper discovered that the Land Commissioner "was still holding on to his old price of \$130,000.00. That was out of the question so far as my client was concerned."⁸

Shortly thereafter, the government had its Lanai lands reappraised, and the Land Commissioner then asked the Superintendent of Public Schools, W. H. Babbitt, to draw up a list of lands which would be suitable for school sites and would have a total value of about \$100,000.00--the reduced valuation which the government had established on its Lanai lands.⁹

When Gay's attorney was informed of these further developments, he once again formally approached the Land Commissioner, and asked him

. . . if there were any lands which might be required by the Government that might be acceptable in exchange for Lanai. . . . He handed me . . . [a] letter of Mr. Babbitt, together with the maps, descriptions of the land, assessed values. . . . I saw Babbitt and asked him what his first choice was, and he told me what he wanted, and then I asked Mr. Pratt if he would accept the land of Kalawahine, in exchange. . . .

He said he could not make any promises as to what lands he would accept, but if I wished to get together a list of lands that we were willing to give, and would make a written offer, that might be considered. I secured a large number of options, because I wanted to have more than one string to my bow, or, more than one line to offer. . . .¹⁰

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Among the options secured by Gay was one for the purchase of 293.5 acres of land on Tantalus at \$54,000 plus others for the purchase of some 3 acres in Honolulu at \$39,000. The Land Commissioner indicated his willingness to accept these lands in exchange for the government's Lanai holdings of nearly 48,000 acres. In addition, the government agreed to release Gay from further payments on the leases of the Lanai lands which he was to acquire through exchange. Finally, through this exchange, Gay was to gain sole and undisputed possession to the water rights which were essential to the development of a major ranching enterprise on Lanai.

This agreement finalized the exchange for all practical purposes, but before a deed to the land was executed, Governor Carter thought it prudent to call a meeting at his office to provide interested parties with an opportunity to express their opinions. The meeting was attended by about 20 people, including those who were parties to the exchange. A substantial part of the opinion recorded during the meeting consisted of strongly stated arguments in opposition to the exchange. Nevertheless, the Governor concluded that "the weight of Public opinion expressed at the meeting . . . appear to me to favor an exchange," and he therefore directed the Commissioner of Public Lands "to proceed with the next step in this matter, viz.: to ascertain whether any responsible party in the Territory will offer the upset price or a higher figure. . . ."11 Such a notice was immediately published, specifying a period of 2 weeks during which the Commissioner indicated his willingness "to receive offers of other lands that are equal in value to those of Lanai. . . ."12 The official notice failed to mention that Mr. Gay held leases on the government lands which were to be exchanged, a fact which effectively precluded bidding by other parties, even if they had been able to work up an alternative deal during the two-week period. No other bids being received, the government officially accepted Mr. Gay's proposition.

At this juncture one of the most vociferous critics of Governor Carter's land policies, Lincoln L. McCandless, secured an injunction from the Territorial Court for the First Circuit to prevent the exchange. The Commissioner of Public Lands responded by seeking to have the injunction dissolved on the grounds that the court was without jurisdiction to enforce an injunction which interfered with the office of the Governor. Judge J. T. DeBolt, relying on Castle v. Kapena,¹³ held that a taxpayer has the right to seek an injunction in order "to prevent a public officer from doing what is an injury to the public good."¹⁴ Turning to the substantive issue, the judge found the Lanai exchange illegal in that it violated the "policy and

spirit" of the public land laws, which were designed to "limit the transfer of any land in parcels of over 1,000 acres. The same policy and spirit should pervade and control . . ."15 land exchanges, he concluded. He therefore refused to dissolve the injunction.

On appeal to the Supreme Court,¹⁶ the majority of the court in a 2 - 1 held that under the Organic Act, the power to exchange public for private lands was unlimited as to the land to be given in exchange.¹⁷ Justice Wilder dissented on the grounds that the legislature had clearly intended to limit exchanges to a maximum size of 1,000 acres. He argued that if the Lanai exchange were upheld, then

it is within the power of the commissioner of public lands and the governor to nullify the whole purpose and object of the land act of 1895 by exchanging all of the public domain under that act for, say, building sites in the city of Honolulu or other lands of equal or greater value, but unavailable and undesirable for the purposes of the act. If this exchange is permissible, any exchange is permissible.¹⁸

The injunction of the lower court was dissolved and the Lanai exchange concluded, despite the fact that McCandless attempted to carry an appeal "all the way to the Supreme Court of the United States."¹⁹

The Lanai Exchange and Public Land Policy

Opposition to the Lanai exchange was not confined to the courts. There was a barrage of criticism from critics of the administration and leaders of opposition political parties, who contended that the exchange was a giveaway of valuable lands and a blow to homesteading. In retrospect, it appears that portions of this criticism were well founded, but the concern here is not with the wisdom of particular exchanges, but rather the extent to which they illustrate basic problems inherent in the development of sound exchange policy. The major questions raised by the Lanai exchange were threefold.

In the first place, this exchange, like the Esplanade exchange, was a drastic departure from the traditional policy of using exchanges to secure land for specific public purposes. As has been observed, the Superintendent of Public Education had furnished a list of school sites required by the Territory in anticipation of the Lanai exchange,²⁰ but his recommendations were largely ignored.